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No. 88-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

RICHARD T. CONWAY
(Counsel of Record)
RALPH J. MOORE, JR.
D. EUGENIA LANGAN

SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

DAVID P. LEE
Vice Chairman and
General Counsel
NATIONAL RAILWAY
LABOR CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7200

Attorneys for the National Railway Labor Conference

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This *amicus* brief is being filed with the written consent of the parties pursuant to Supreme Court Rule 36.2.

STATEMENT OF THE CASE

From its inception in 1976, petitioner (hereinafter "Conrail") unilaterally has established, and at times modified, the medical or physical standards, tests and procedures applicable to its employees, without bargaining with the unions representing those employees. Employees are examined periodically and after returning to duty following a specified period of absence, to determine their fitness for duty. Conrail also has a policy (generally referred to as "Rule G"), unilaterally established and enforced without bargaining with the unions, pro-

hibiting the on-duty use or possession of intoxicants (including drugs) by employees and their use while subject to duty. See Pet. at A-48 through 60. In short, these policies and procedures have been left to managerial discretion, have not been the subject of collective bargaining under the Railway Labor Act ("RLA," 45 U.S.C. §§ 151 *et seq.*), and are not embodied in written agreements between Conrail and unions representing its employees.

Prior to 1987, urinalysis was routinely used to test for blood sugar and albumin and, if an employee previously had been taken out of service for a drug-related problem or in the judgment of the examining physician may have been using drugs, also for drugs. On February 20, 1987, Conrail announced that urinalysis would routinely be used for a drug screen in future physical examinations. Pet. at A-49 and 50. Shortly before, the increasing severity of the drug problem and the importance to railroad safety of preventing drug abuse by railroad employees unhappily had been emphasized by a January 4, 1987 collision of an Amtrak passenger train with Conrail locomotives, operated by a Conrail engineer while under the influence of marijuana, which killed 16 persons and injured 174 others. See Pet. at 2-3.

Nevertheless, respondents (hereinafter referred to as the "unions"), sued to enjoin this increased use of urinalysis to test for drug usage. Although they did not serve a notice under § 6 of the RLA of proposals in regard to that matter, they contended that Conrail had violated the *status quo* which the RLA requires be maintained while the procedures of the Act are being exhausted in a dispute over intended changes in collective agreements affecting rates of pay, rules, or working conditions; *i.e.*, that Conrail's unilateral action in itself gave rise to a "major" dispute under the RLA. The District Court (E.D. Pa.) concluded, however, that the disputed drug testing is "arguably justified" as a "further refinement" of Conrail's practice, acquiesced in by the unions

since 1976, of unilaterally adopting "procedures to ensure an employee's fitness for the job"; and thus dismissed the complaint as involving an arbitrable "minor dispute" within the exclusive jurisdiction of an adjustment board to decide. Pet. at A-24 and 25.

The Third Circuit reversed. Pet. at A-1 through 19, reported as *Railway Labor Executives* v. *Consolidated Rail*, 845 F.2d 1187 (1988). It acknowledged that the controversy is a minor dispute if Conrail's disputed action "can 'arguably' be justified by the existing agreement" whether written or inferred from custom and practice. Pet. at A-9; 845 F.2d at 1190-1191. On substantially identical facts, moreover, two other circuits had held that the action of a carrier in adding a drug screen to the urinalysis aspect of its physical examinations was "arguably" justified so as to give rise to a minor dispute. *Railway Labor Executives* v. *Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987); *Brotherhood of Maintenance* v. *Burlington Northern*, 802 F.2d 1016 (8th Cir. 1986). See Pet. at A-12 and 13; 845 F.2d at 1192-1193. In reaching a contrary conclusion as to Conrail, the Third Circuit sought to ascertain whether there was evidence of a "meeting of the parties' minds" encompassing the disputed drug testing both in general and in detail (Pet. at A-14 and 17; 845 F.2d at 1193 and 1194); concluded that there was no such evidence; and regarded it as "particularly significant" that the General Counsel of the National Labor Relations Board ("NLRB") has taken "the position that drug screening, even where it is added to a pre-existing medical examination program, constitutes a substantial change in working conditions and is a mandatory subject of bargaining under the" National Labor Relations Act ("NLRA"). Pet. at A-16 and 17; 845 F.2d at 1194.

INTEREST OF AMICUS CURIAE

The National Railway Labor Conference ("NRLC") is an unincorporated association which includes almost

all of the nation's Class I railroads, employing more than 90% of all railroad employees, among its members.[1] Those members include Amtrak, which provides intercity passenger service (for the most part over track maintained by other railroads and used also for freight operations), Conrail, and various other railroads that transport freight and, in some instances, also provide commuter passenger service. NRLC represents member railroads in multi-employer collective bargaining with unions representing their employees, and in regard to a variety of other labor relations matters of interest to the railroads generally. Among other things, it assists and advises member railroads in connection with the arbitration of minor disputes arising out of workplace grievances or the application and interpretation of collective bargaining agreements.

The issues in this case are of critical importance to the railroad industry. The practice under which a carrier unilaterally has established and modified fitness-for-duty standards applicable to its employees, and the tests and other procedures utilized in implementing those standards, generally has existed throughout the railroad industry. That also is true of Rule G and the means by which it has been enforced.[2] Thus, these matters traditionally have not been a subject of collective bargaining under the RLA or of written collective bargaining agreements.

In our view, this long-established practice implies that the unions have agreed that these policies, including re-

[1] CSX Transportation, a member of NRLC, does not support the arguments presented in this brief by the NRLC, except with respect to the issue concerning the inappropriateness of the Third Circuit's "meetings of the minds" test for determining the existence of a past practice.

[2] See the Brief for the National Railway Labor Conference as Amicus Curiae in Support of the Petition in *Burlington Northern Railroad Company* v. *Brotherhood of Locomotive Engineers*, No. 87-1631, at pp. 8-9, which petition is pending before the Court.

visions thereof, should be left to managerial discretion, and indicates that in any event they are managerial prerogatives which the Congress did not intend to make mandatorily bargainable under the RLA. But however that may be, there can be no doubt that this established practice has permitted the railroads to adapt their fitness requirements and means or methods of enforcement in the light of the seriousness of perceived threats to railroad safety and/or advances in medical technology, without previously invoking the long and drawn-out major dispute procedures of the RLA in an effort to reach agreements with each of the numerous unions representing railroad employees—which in any event could lead to strikes if no agreement is reached.

With rare if any exceptions, the unions did not challenge the right of a carrier to proceed unilaterally in regard to these matters until the carriers in recent years intensified their efforts to contain the threat to railroad safety from the use and abuse of intoxicants and extended the use of urinalysis to test for alcohol and drugs.[3] This has given rise to the conflict of appellate decisions referred to above in regard to the use of drug testing in physical examinations and referred to in the certiorari petition (and NRLC's *amicus* brief) in No. 88-1673 in regard to drug testing in enforcing Rule G.

There is no question about the importance of railroad safety or about the importance to railroad safety of maintaining a drug-free working environment.[4] The de-

[3] In *District Lodge 19* v. *Pacific Trans. Co.*, 105 L.R.R.M. 2046 (E.D. Cal. 1980), and in *Southern Pacific Transportation Co.* v. *Locomotive Engineers*, 96 Labor Cases ¶ 14,016 (N.D. Cal. 1980), two of the unions contested the right of the Southern Pacific unilaterally to adopt the use of an "intoxilyzer" breath analysis device to measure the concentration of alcohol in an employee's blood for purposes of enforcing Rule G. In both cases, the courts held that this gave rise to a minor dispute.

[4] The court below did "not minimize the serious drug and alcohol problems in the transportation industry," and noted that the unions

cision below, if upheld by this Court, would substantially interfere with the ability of the railroads to use advanced medical technology, including perhaps future improvements upon or beyond urinalysis, in fighting the threat to railroad safety from intoxicants including illegal drugs. The case also raises issues of general importance to the interpretation of the RLA. Thus, we urge this Court to reverse the decision below.

SUMMARY OF ARGUMENT

Under the RLA, disputes over changes in existing agreements respecting the "rates of pay, rules, or working conditions" of employees, including agreements implied from established practices, are called major disputes, while disputes over the application or interpretation of an existing agreement or established practice are called minor disputes. The parties to a major dispute are required to maintain the *status quo* while exhausting procedures that "are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute," *Railway Clerks* v. *Florida E.C. R. Co.*, 384 U.S. 238, 246 (1966); but if no agreement is reached the parties may resort to self help, including strikes. Minor disputes not settled by agreement are subject to arbitration by an adjustment board, which has exclusive jurisdiction over such disputes, and strikes are unlawful at any time. If a union contends that a carrier's unilateral action changed an agreement or established practice in violation of the *status quo* provisions and the carrier contends that the action was permitted by the agreement or established practice, the courts of appeals consistently have held that the dispute is minor if the carrier's position is at least arguable.

"stated in their brief that they 'yield to no one in abhorence [sic] of alcohol or drug use in employment, or in the desire to purge the industry of their adverse effects.'" Pet. at A-18; 845 F.2d at 1195.

In holding that Conrail's expanded use of long-required urinalysis as a drug screen is not even arguably justified, the court below thought it must determine whether "it is plausible to believe that there was in fact a meeting of the parties' minds" that encompassed the disputed drug testing. That approach contravenes the teaching of this Court that a collective bargaining agreement is not "governed by the same old common-law concepts" applicable to other contracts, but rather "is a generalized code to govern a myriad of cases" not "wholly anticipate[d]," and thus "calls into being a new common law . . . of a particular industry or of a particular plant." *Transportation Union* v. *U.P. R. Co.*, 385 U.S. 157, 160-161 (1966). This Court repeatedly has emphasized the special competence of adjustment boards to determine the significance of custom and practice, as they include "representatives of management and labor" who are "in daily contact with workers and employers, and know[] the industry's language, customs, and practices." *Gunther* v. *San Diego A.E. R. Co.*, 382 U.S. 257, 261 (1965). As the Seventh and Eighth Circuits held as to other carriers in similar circumstances, Conrail's disputed drug testing is at least arguably justified by its past practice of determining unilaterally fitness-for-duty standards, tests and procedures.

Given the well established law under the RLA in regard to these matters and the differences in the statutory schemes, the particular significance which the court below attributed to the views of NLRB's General Counsel as to the application of the NLRA to drug testing is wholly unwarranted. In any event, while arbitration under the NLRA is voluntary, the courts require arbitration of even frivolous claims if covered by an arbitration agreement, and construe arbitration agreements to favor coverage in a manner similar to the "arguable" standard applied under the RLA in distinguishing minor from major disputes.

If the court below correctly held that there must be, and has not been, a plausible showing of a "meeting of the minds" on the disputed drug testing to give rise to a minor dispute, then that is a matter as to which there is no express or implied collective agreement. Under § 2 Seventh of the RLA as construed by this Court, a carrier may make changes in matters not "embodied in agreements" without invoking the major dispute procedures of the Act; and if, as here, the union did not invoke such procedures by serving an appropriate notice under § 6 of the Act, such unilateral changes do not violate the *status quo*.

In any event, the major dispute procedures apply only to changes in the "rates of pay, rules, or working conditions" of employees; *i.e.*, those are the only mandatory subjects of bargaining under the RLA. Drug testing at most is a method of enforcing a rule or working conditions, and is not itself a rate of pay, rule, or working condition. Hence, Conrail could require drug testing in enforcing its fitness-for-duty standards without proceeding under the major dispute provisions of the RLA even if they otherwise would be applicable.

ARGUMENT

I. The Statutory Framework under the Railway Labor Act.

The "major purpose of . . . the Railway Labor Act was 'to provide a machinery to prevent strikes.'" *Texas & N.O. R. Co.* v. *Ry. Clerks*, 281 U.S. 548, 565 (1930). The Act thus provides procedures for dealing with disputes over the representation of employees,[5] which are not involved here, and with what commonly are referred

[5] The National Mediation Board ("NMB") has jurisdiction to decide representation disputes. 45 U.S.C. § 152 Ninth. Where such a dispute is involved, strikes may be enjoined. *E.g.*, *Summit Airlines* v. *Teamsters Local Union No. 295*, 628 F.2d 787 (2d Cir. 1980).

to as "major" and "minor" disputes in accordance with terminology adopted in *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 722-728 (1945), on rehearing, 327 U.S. 661 (1946). Major disputes are "over the formation of collective agreements or efforts to secure them," and thus "look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." 325 U.S. at 723. The major dispute provisions of the RLA do not apply, therefore, if the issue is "whether an existing agreement controls the controversy." *Ibid.* Such issues are minor disputes "over the meaning or proper application" of an agreement "with reference to a specific situation or to an omitted case." *Ibid.* An "omitted case" involves "some incident of the employment relation, or asserted one, independent of those covered by the collective agreement . . . ." *Ibid.*

In regard to major disputes, Section 2 Seventh of the RLA prohibits a carrier from "chang[ing] the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act." 45 U.S.C. § 152 Seventh. Thus, "it operates to give legal and binding effect to collective agreements, and it lays down the requirement that collective agreements can be changed only by the statutory procedures." *Shore Line* v. *Transportation Union*, 396 U.S. 142, 156 (1969). That is true of implied agreements, such as those that arise from established practices, as well of express written agreements. *Id.* at 153-154, and 159 (Harlan, J., concurring in part and dissenting in part). However, as § 2 Seventh makes clear, a carrier need not resort to the "statutory procedure" in regard to changes in arrangements "made by the carrier for its own convenience and purpose" that have not been "embodied" in either an express or implied collective agreement. *Williams* v. *Terminal Co.*, 315 U.S. 386, 400, 403 (1942). Accord, *Order of Conductors* v. *Pitney*, 326 U.S. 561, 564-565 (1946).

Moreover, the major-dispute procedure expressly applies only to "intended change[s] in agreements affecting rates of pay, rules, or working conditions"; *i.e.*, only those subjects are mandatorily bargainable.[6] Section 6 requires both "[c]arriers and representatives of the employees" to serve the other with a written notice of such an "intended change," and, "where such notice of intended change has been given," prohibits alteration of the *status quo* as to the "rates of pay, rules, or working conditions" involved "until the controversy has been finally acted upon as required by" the Act. 45 U.S.C. § 156. In the absence of agreement, the parties to a major dispute must exhaust procedures that include conferences, mediation, and, at the discretion of the President, investigation and recommendations by an emergency board. See *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1969). Those procedures "are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Railway Clerks* v. *Florida E.C. R. Co.*, *supra*, 384 U.S. at 246. But if exhausted without a resolution of the dispute, the parties may resort to self help, including strikes of the carrier involved in the dispute. *Railroad Trainmen* v. *Terminal Co.*, *supra*, 394 U.S. at 378-379, 384.[7]

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[6] The "duty to bargain imposed by the RLA extends only to those proposals directly related to 'rates of pay, rules, and working conditions.' . . . One of these issues must be implicated, and the action by management must affect people presently in the bargaining unit" represented by the union involved. *Intern. Broth. of Teamsters* v. *Southwest Airlines*, 842 F.2d 794, 800 (5th Cir. 1988). See, *e.g.*, *Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330, 334, 339 (1960); *Telegraphers* v. *Ry. Express Agency*, 321 U.S. 342, 347 (1944).

[7] In addition, this Court has held that the Norris-LaGuardia Act deprives the courts of jurisdiction to enjoin secondary picketing of other railroads. *Burlington Northern Railroad Co.* v. *Brotherhood of Maintenance of Way Employes*, 55 U.S.L.W. 4576 (1987).

Minor disputes, on the other hand, are decided by arbitration under § 3 of the RLA (45 U.S.C. § 153) if not settled by agreement of the parties. Disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" (§ 3 First (i)) may be submitted to the National Railroad Adjustment Board ("NRAB") permanently established by § 3 First or to alternative adjustment boards created pursuant to § 3 Second. The Court repeatedly has held that the jurisdiction of these adjustment boards to arbitrate minor disputes is exclusive so that the courts have no jurisdiction to decide them.[8] A union cannot strike over such a dispute either before or after the decision of the adjustment board.[9] In short,

> "Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements. . . . The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. . . . *Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts.*"

Union Pacific R. Co. v. *Sheehan*, 439 U.S. 89, 94 (1978) (emphasis added; citations omitted).

Although the foregoing principles are well established by many decisions in addition to those cited, it often is

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[8] *E.g.*, *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972); *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950).

[9] *E.g.*, *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957) (before); *Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 33 (1963) (after).

necessary for a court to decide conflicting contentions as to whether a particular dispute is minor or major in nature. "Confronted by such opposing characterization of particular disputes, the courts of appeals have consistently ruled that if the disputed action of one of the parties can 'arguably' be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not 'obviously insubstantial,' the controversy is within the exclusive province of" an adjustment board. *Local 1477 United Transportation Union* v. *Baker*, 482 F.2d 228, 230 (6th Cir. 1973).

That "arguably" standard for distinguishing between minor and major disputes has been adopted by every court of appeals that has considered the matter,[10] and has not been contested in this case. Any less rigorous standard would undermine the exclusive jurisdiction of adjustment boards to decide the merits of minor disputes and the intent of the Congress to keep them out of the courts.

II. This Dispute Is A Minor Dispute For an Adjustment Board to Decide.

Although the court below acknowledged the applicability of the "arguably" standard, it reached a decision clearly contrary to the spirit and purpose of that standard and of the RLA. That court proceeded as though its task were to apply the common law to decide the precise extent to which there was a "meeting of the minds" between Conrail and the unions. Even though previously Conrail determined and revised its fitness

[10] See the Brief for Respondents in Opposition to the petition for writ of certiorari in *Railway Labor Executives' Association* v. *Chicago and North Western Transportation Company*, No. 88-464, now pending before this Court. Appendix C to that brief lists some 50 cases, decided by 10 different circuits, in which the "arguably" standard has been adopted and applied.

standards, procedures and tests, without consultation with or objection from the unions; even though those tests included urinalysis which at times was used for a drug screen as well as for other purposes; and despite the importance to railroad safety of preventing the use and abuse of dangerous and illegal drugs by railroad employees; the court below concluded that Conrail had no "arguable" justification for using urinalysis as a drug screen in long-required routine physical examinations. This was clear error.

The court below stated that, to find a minor dispute, it must "determine[] that it is plausible to believe that there was in fact a meeting of the parties' minds on the general issue" (Pet. at A-14; 845 F.2d at 1193), and that it had "search[ed] the past practices of the parties in vain for any indication of an agreement" between them "on such crucial matters as the drug test to be used, the methods of confirming positive results, and the confidentiality protections to be employed" (Pet. at A-17; 845 F.2d at 1194).[11] That "line of reasoning" is similar to the one this Court rejected in *Transportation Union* v. *U.P. R. Co.*, *supra*, 385 U.S. at 160-161, in regard to a union contention that "rests on the premise that collective bargaining agreements are to be governed by the same common-law principles which control private contracts between two private parties." As the Court there stated:

> "A collective bargaining agreement is not an ordinary contract for the purchase of good and services, nor is it governed by the same old common-law concepts which control such private contracts. . . .' * * * [I]t is a generalized code to govern a myriad of cases which the draftmen cannot wholly anticipate. * * * The collective agreement covers the whole em-

[11] The court did not point to problems in regard to those "crucial matters" that differ in nature from any that existed in Conrail's prior use of urinalysis to test for drug use in some physical examinations without objection from the unions.

ployment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.'" (Citations omitted.)[12]

See also, *Gunther* v. *San Diego & A.E. R. Co.*, *supra*, 382 U.S. at 261-262.

Thus, if a carrier's practice has "occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions," an implied agreement thereto arises, and those "actual, objective working conditions and practices" are "broadly conceived . . . ." *Shore Line* v. *Transportation Union*, *supra*, 396 U.S. at 153, 154. As the court below once recognized, "when the railroad has engaged in a certain activity over a sufficient period of time for the union to become aware of it and react accordingly if it objects," the union's failure to object is enough to show acquiescence. *Baker* v. *United Transportation Union, AFL-CIO*, 455 F.2d 149, 156 (3d Cir. 1971). And, where that has been the past practice, as here, the implied "working condition" may be "an ongoing management prerogative that permits the railroad to change some aspect of its operations" unilaterally in the future as well. *Id.* at 154-155. This was the approach followed by the Seventh and Eighth Circuits in holding, upon substantially identical facts, that a dispute over a railroad's unilateral use of urinalysis as a drug screen in physical examinations is a minor dispute.[13] That

[12] Among others, the Court cited *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 550 (1960), in which it further concluded that a collective bargaining agreement under the NLRA "is not in any real sense the simple product of a consensual relationship."

[13] "For the past twenty years N & W has unilaterally determined what tests are administered as part of all employee medical examinations and the union has not previously objected to N & W's control over the content of these examinations." Hence, it is arguable that the "parties' past practice has been to accord N & W unilateral authority to determine the appropriate tests to conduct during

approach also should have been followed by the court below in this case and should be followed here.

Other interpretations also may be arguable, but the determination of which is correct is within the province of an adjustment board rather than the courts. That is particularly true in this case because there is no written agreement and interpretation turns altogether upon the implications to be drawn from custom and practice. The Congress in providing for arbitration of minor disputes "intended to leave a minimum of responsibility to the courts" for the very reason, among others, that the interpretation of collective agreements often requires consideration of "usage, practice and custom" which "must be taken into account and properly understood." *Order of Conductors* v. *Pitney*, *supra*, 326 U.S. at 566, 567. The NRAB was created as "[a]n agency especially competent" to deal with such issues. *Id.* at 567. "Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications." *Slocum* v. *Delaware, L. & W. R. Co.*, *supra*, 339 U.S. at 243. Its members include "representatives of management and labor . . . peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world," as they are "in daily contact with work-

required medical examinations." *Railway Labor Executives* v. *Norfolk & Western Ry.*, *supra*, 833 F.2d at 706. "BN's past practice of requiring employees to submit to periodic and comprehensive medical examinations in order to ensure all employees are fit for duty is not challenged. . . . It is beyond dispute the drug screen is a new technique; the underlying purpose of the medical examinations, however, remains the same—to ensure all BN employees are fit for duty. The drug screen is nothing more than a method designed to detect the presence of a newly emerging threat to that fitness. . . . It should come as no surprise to the parties that the components of a work fitness physical examination will change with the times." Thus, BN's disputed "actions . . . are arguably justified" so that "this dispute should be submitted to the" NRAB. *Brotherhood of Maintenance* v. *Burlington Northern*, *supra*, 802 F.2d at 1024.

ers and employers, and know[] the industry's language, customs, and practices." *Gunther* v. *San Diego & A.E. R. Co.*, *supra*, 382 U.S. at 261.

The Court below thus usurped the jurisdiction of an adjustment board in circumstances where its special competence is most important—where decision turns altogether upon the implications to be drawn from custom and practice. That error was compounded by the particular significance attributed to a memorandum issued by the NLRB's General Counsel "to assist the Regional Offices in the disposition of . . . cases inovlving drug testing." Memorandum GC 87-5 as reprinted in Daily Labor Report No. 184 (BNA, September 24, 1987), at D-1. There is no "absence of viable guidelines" under the RLA for distinguishing between major and minor disputes, and thus between the respective jurisdictions of courts and arbitrators, so as to necessitate resort to analogies under the NLRA. See *Railroad Trainmen* v. *Terminal Co.*, *supra*, 394 U.S. at 391. But even if it were otherwise, the court below ignored the teaching that "analogies must be drawn circumspectly with due regard to the many differences between the statutory schemes." *Id.* at 383.

The General Counsel's memorandum is directed to the policies of her office in deciding whether to file unfair labor practice complaints and thus is concerned with her views as to the jurisdiction and policies of the NLRB with respect to such complaints—including, in a portion of her memorandum apparently overlooked by the court below—the NLRB's policies regarding deferral to arbitration.[14] There are fundamental differences between the

[14] Although the NLRB need not defer to arbitration, its general "policy is to refrain from exercising jurisdiction in respect to disputed conduct arguably both an unfair labor practice and a contract violation when . . . the parties have voluntarily established a binding settlement procedure." *William E. Arnold Co.* v. *Carpenters*, 417 U.S. 12, 16 (1974). The General Counsel discussed deferral to arbitration separately, at the end of her memorandum, and advised that the "Regions should apply the established Board criteria whether to defer cases" so that "if a dispute arguably raises issues of contract interpretation . . . subject to binding arbitration, it may be appropriate to defer the case." Daily Labor Report No. 184, *supra*, at D-3. Thus, assuming an applicable arbitration clause, the General Counsel (and the NLRB) might well defer to arbitration in circumstances such as exist here.

statutory schemes in those regards. Most importantly, there is no equivalent in the NLRA to the mandatory arbitration procedures in § 3 of the RLA, and there is no equivalent in the RLA to the NLRB or to the provision under which the NLRB's jurisdiction over unfair labor practice charges "shall not be affected by any other means of adjustment . . . established by law, agreement, or otherwise" (29 U.S.C. § 160(a)). Hence, the "relationship of the [NLRB] to the arbitration process is of a quite different order" than the relationship of a court to that process. *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 436 (1967). The General Counsel in her memorandum is not concerned with the latter relationship, but the law under the NLRA in that regard provides the closest analogy for purposes of ascertaining the relationship of the courts to arbitration under the RLA.

Arbitration under the NLRA is voluntary, but if a collective agreement contains an arbitration clause, the courts compel arbitration of a covered dispute even if the position of one of the parties is believed to be frivolous. *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568 (1960). And, "unless it can be said with positive assurance that the arbitration clause is not susceptible to" such an interpretation, coverage is found "with doubts being resolved in favor of coverage." *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 582-583 (1960). This "'presumption of arbitrability' announced in the *Steelworkers Trilogy* applies to safety disputes" as well as others. *Gateway Coal Co.* v. *Mineworkers*, 414 U.S. 368, 379 (1974). It goes at least as far as the "arguably" standard under the RLA in avoiding judicial encroach-

ment upon the jurisdiction of labor arbitrators. Indeed, like the "arguably" standard (see pp. 13-16 *supra*), the presumption of arbitrability flows in part from the fact that "the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it," *id.* at 378;[15] and, as the Court added, "the special expertise of the labor arbitrator, with his knowledge of the common law of the shop, is as important" in regard to "labor disputes touching the safety of employees as to other varieties of disagreement," *id.* at 379.

Plainly, therefore, when considered in the light of the differences between the statutory schemes, the law under the NLRA provides no support for the decision below denying arbitration in this case. But however that may be, it is well established under the RLA that a dispute such as this is minor and thus arbitrable by an adjustment board if the carrier's position is at least arguably justified by the collective agreement including custom and practice. Conrail's position surely is arguable, and we believe much stronger than that.

III. Even If the Collective Agreement Did Not Authorize Conrail's Disputed Action, It Did Not Restrict that Action and Conrail Could Act Without Invoking the Major Dispute Provisions of the Railway Labor Act.

As shown above, we believe that the court below erred in holding that the case does not give rise to a minor dispute because the court found no evidence of a "meeting of the minds" encompassing the disputed drug testing. But even if this Court should agree with the court below in that regard, there is no evidence of a "meeting of the minds" in which Conrail agreed *not* to revise its policies in regard to drug testing. Assuming a holding that there is no collective agreement that either authorizes or restricts Conrail's expanded drug testing, Conrail could unilaterally institute that drug testing without first

[15] Thus, "the labor arbitrator necessarily and appropriately has resort to considerations foreign to the courts. . . ." 414 U.S. at 378.

proceeding under § 6 and the other major disputes provisions of the Act or violating their *status quo* requirements.

As pointed out at p. 9 above, § 2 Seventh of the RLA expressly prohibits a carrier from "chang[ing] the rates of pay, rules, or working conditions of its employees, as a class *as embodied in agreements* except in the manner prescribed in such agreements or in Section 6 of the Act" (emphasis added); but there is no prohibition of such changes if the rates of pay, rules, or working conditions are not "embodied in agreements" either written or implied. And, this Court held in *Williams* v. *Terminal Co.*, *supra*, and in *Order of Conductors* v. *Pitney*, *supra*, that thus where there is no existing agreement the carrier may make unilateral changes without proceeding under § 6 and related provisions of the Act. See p. 9 *supra*.

In *Shore Line* v. *Transportation Union*, *supra*, the union had served a notice under § 6 of the RLA in regard to a matter, which was pending when the carrier effectuated the disputed action respecting that matter, and thus brought into play the *status quo* provisions in § 6 and related provisions of the RLA. See 396 U.S. at 144-145. The Court held that, when the union thus has "move[d] to bring . . . a previously uncovered condition within the agreement," the *status quo* includes working conditions in effect when the notice was served even if not embodied in an agreement. 396 U.S. at 155. *Williams* and *Pitney* were distinguished as involving the issue of whether § 6 and the *status quo* provisions applied, rather than the scope of those provisions when § 6 had been invoked so as to bring the *status quo* requirements into play. 396 U.S. at 157-158. But the Court did not overrule *Williams* and *Pitney*, and hardly could do so in view of the language of § 2 Seventh of the Act.

None of the unions served a § 6 notice proposing an agreement in regard to Conrail's fitness policies in general or drug testing in particular, before (or after) Con-

rail implemented its present drug testing policy. Hence, assuming a holding that Conrail's collective agreements neither authorized nor restricted the disputed drug testing, the major dispute provisions and their *status quo* requirements are not applicable and have not been violated by Conrail.[16]

IV. Drug Testing Is Not A Mandatory Subject of Bargaining Under the Railway Labor Act.

An alternative ground for reversing the decision below is that drug testing is neither a rate of pay, a rule nor a working condition, as those terms are used in the RLA, and thus is not an issue as to which § 6 and related major dispute provisions of the Act mandates collective bargaining. See n. 6 on p. 10 *supra* and accompanying text. Rather, drug testing is a means of assuring employee compliance with a fitness-for-duty standard, as here, and/or "Rule G" or some similar restriction on employee use of intoxicating alcohol and drugs (as in No. 87-1631), which are directed (among other things) towards providing safe and drug-free "working conditions."[17]

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[16] See, also, *Intern. Ass'n of Machinists* v. *Trans World Airlines*, 839 F.2d 809, 812-815 (D.C. Cir. 1988), *cert. denied*, 57 U.S.L.W. 3204 (1988); *International Ass'n of M. & A. Wkrs.* v. *Reeve A.A. Inc.*, 469 F.2d 990, 993 (9th Cir. 1972), *cert. denied*, 411 U.S. 982 (1973); *Airline Flight Atten., Etc.* v. *Tex. Intern., Etc.*, 411 F. Supp. 954, 962-963 (S.D. Tex. 1976), aff'd mem., 566 F.2d 104 (5th Cir. 1978); *Atlanta & West Point R. Co.* v. *United Transportation Union*, 307 F. Supp. 1205, 1208 (N.D. Ga. 1970), aff'd, 439 F.2d 73 (5th Cir. 1971), *cert. denied*, 404 U.S. 825 (1971).

[17] While a charge therein is not involved in this case, we doubt if those standards and restrictions constitute a "rule" or "working condition" as to which the RLA mandates bargaining, at least insofar as they apply to the use or abuse of intoxicating alcohol and drugs. But see *Intern. Broth. of Teamsters* v. *Southwest Airlines*, *supra*, 842 F.2d at 799-801. Safety of operations is too critical to the successful operation of railroads and airlines, for those matters to have been left by the Congress to the constraints of collective bargaining. See *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 678-679 (1981) ("Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business"). We think it inconceivable that the Congress intended a carrier to bargain about a proposal that employees be allowed to operate a train or airplane while drunk or under the influence of illegal drugs, and be subject to strikes if it did not agree, yet that would be a possible consequence of a holding that employee restrictions in that regard are a mandatory subject of bargaining. This would "represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the . . . Act." *Textile Workers* v. *Darlington Co.*, 380 U.S. 263, 270 (1965). See *Local 346* v. *Labor Relations Com'n*, 391 Mass. 429, 462 N.E.2d 96, 102-103 (Sup. Jud. Ct. 1984). The fact that fitness-for-duty standards and Rule G traditionally have not been bargained about in the railroad industry reinforces the view that they are not mandatorily bargaining (see pp. 24-25 *infra*).

In *Rust Craft Broadcasting of New York, Inc.*, 225 N.L.R.B. 327 (1976), the NLRB rejected a contention that an employer violated the mandatory duty to bargain under § 8(a)(5) of the NLRA "by unilaterally initiating a more dependable method of enforcing its long-standing rule that employees record their time 'in and out.'" *Ibid.* Although this clearly constituted "a departure from the previous practice, more importantly the rule itself remained intact. And to those employees who had conscientiously followed this rule . . . , the new timeclock procedure would have been inconsequential." *Ibid.* More generally, "absent discrimination, an employer is free to choose more efficient and dependable methods for enforcing its workplace rules." *Ibid.*[18]

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[18] See also, *e.g.*, *American Ambulance*, 255 N.L.R.B. 417, 422-423 (1981), enforced *per curiam* without opinion, 692 F.2d 762 (9th Cir. 1982); *Goren Printing*, 280 N.L.R.B. No. 64, 123 L.R.R.M. 1276 (1986); *Moody Chip Corp.*, 243 N.L.R.B. 265, 272 (1979); *Bureau of National Affairs, Inc.*, 235 N.L.R.B. 8, 9 (1978). In his influential concurring opinion in *Fibreboard Corp.* v. *Labor Board*, 379 U.S. 203, 223 (1964), Justice Stewart observed that in "many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are

This is all that has occurred here. Conrail has initiated a "more efficient and dependable" method (than visual observation) of enforcing its long-standing rule that employees be fit for duty as applied to drug usage. The use of urinalysis for that purpose as "to employees who had conscientiously followed" the rule would be "inconsequential," and that it even more true in this case since urinalysis has been and is required by Conrail even apart from its use as a drug screen.

Application of this approach is even more appropriate in construing the RLA since the most pertinent statutory language ("working conditions") is not as broad on its face as the otherwise similar term in the NLRA ("terms and conditions of employment").[19] Justice Stewart, concurring in *Fibreboard Corp.* v. *Labor Board*, *supra*, observed that "[i]n common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment" (379 U.S. at 222), but that the term is "susceptible of diverse interpretations" and had been more broadly construed by the NLRB and the courts in reviewing its decisions (*id.* at 221-222).[20] In rejecting a contention that "the term 'conditions of employment' has no broader meaning than that perhaps spontaneously suggested by the term

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not 'with respect to . . . conditions of employment'" under the NLRA. *Rust Craft* did not refer to a prior decision, in *Medicenter, Mid-South Hospital*, 221 N.L.R.B. 670 (1975), in which the NLRB adopted the decision of an Administrative Law Judge ("ALJ") without issuing a separate opinion of its own. The ALJ dismissed a complaint based upon the unilateral use by the employer of polygraph testing for the purpose of identifying employees who had committed acts of vandalism in the course of a strike, as the union had had adequate opportunity to bargain about that matter; but in so doing asserted that the employer had a mandatory duty to bargain. In Memorandum GC 87-5, Daily Labor Report No. 184, *supra* at D-1, the General Counsel primarily relied upon *Medicenter* for her failure to "believe that drug testing falls within the realm of managerial or entrepreneurial prerogatives excluded from" the duty to bargain under the NLRA. She also stated that '[i]n addition, it is our view that a drug test is not simply a work rule—rather, it is a means of policing and enforcing compliance with a rule," and that there "is a critical distinction between a rule against drug usage and the methodology used to determine whether the rule is being broken" (*id.* at D-2), without noting that the Board in *Rust Craft* had relied upon that "critical distinction" in concluding that the unilateral institution of improved means for enforcing a rule is not mandatorily bargainable.

[19] Sections 8(a)(5) and (d) of the NLRA mandate bargaining with respect to " 'wages, hours, and other terms and conditions of employment,' " so that the "duty is limited to those subjects . . . ."

Labor Board v. *Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). In *Broth. of Locomotive Eng.* v. *Burlington Northern*, 838 F.2d 1087, 1090 (1986), *cert. pending*, No. 87-1631, the Ninth Circuit rejected a contention that a carrier's use of drug testing in enforcing Rule G "is entirely a matter of management prerogative . . . not subject to collective bargaining," pursuant to an interpretation of the RLA as "requir[ing] parties to bargain over any proposal whose primary impact is the loss—or potential loss—of existing employment or employment-related benefits." 838 F.2d at 1090. That sweeping interpretation has no basis in precedent or in common sense. "Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales, all may bear upon the security of workers' jobs. Yet it is hardly conceivable that such decisions so involve 'conditions of employment' that they must be negotiated with the employees' bargaining representative." Stewart, J., concurring in *Fibreboard*, 379 U.S. at 223. Thus, "bargaining over management decisions that have a substantial impact on the continued availability of employment" is not necessarily required under the NLRA, *First National Maintenance*, *supra*, 452 U.S. at 679, and that plainly must be true also under the RLA.

[20] In the NLRA, "Congress assigned to the Board the primary task of construing" the provisions of the Act regarding the mandatory subjects of bargaining; thus, "if its construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute." *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 495, 497 (1979). Congress has assigned the primary task of construing the RLA to the courts, rather than to an administrative agency, so that the courts can adopt the interpretation that they believe to be most justifiable even if some other interpretation is reasonably defensible.

'working conditions,' and that it therefore refers to the physical conditions under which employees are compelled to work rather than to the terms or conditions under which employment status is afforded or withdrawn," the NLRB noted that Senator Wagner (sponsor of the NLRA) had stated in debates on amendments thereto, "that the term 'condition of employment' as used in the original Act was intended to have a broader meaning than 'working conditions' . . . . (93 Congressional Record 3427)." *Inland Steel Company*, 77 N.L.R.B. 1, 7 (1948), enforced, 170 F.2d 247 (7th Cir. 1948), aff'd, 339 U.S. 382 (1950).[21]

Moreover, "the whole idea of what is bargainable has been greatly influenced by the practices and customs of the railroads and their employees themselves." *Telegraphers* v. *Chicago & N.W. R. Co.*, *supra*, 362 U.S. at 338.[22] Since neither fitness-for-duty requirements, Rule G, nor the tests and procedures utilized in enforcing compliance by a carrier with those requirements have heretofore been subjects of collective bargaining, on Conrail or in the railroad industry as a whole with rare if any exceptions, see pp. 4-5 *supra*, this provides further support for a holding that drug testing is not a mandatory subject of bargaining under the RLA.

[21] In enforcing that decision, the Seventh Circuit similarly noted that: "A comparison of the language of the two Acts shows that Congress in the instant legislation must have intended a bargaining provision of broader scope than that contemplated in the Railway Labor Act. . . . Congress in the instant legislation used the phrase, 'other conditions of employment,' instead of the phrase 'working conditions,' which it had used previously in the Railway Labor Act. We think it is obvious that the phrase which it later used is more inclusive than that which it had formerly used." *Inland Steel Co.* v. *National Labor Relations Board*, 170 F.2d 247, 254-255 (1948).

[22] See, also, *Telegraphers* v. *Ry. Express Agency*, *supra*, 321 U.S. at 346. See also, *e.g.*, under the NLRA, *First National Maintenance Corp.* v. *NLRB*, *supra*, 452 U.S. at 684 (while "current labor practice" is "not a binding guide," the fact that collective bargaining and agreement under the NLRA in regard to a particular matter is "relatively rare," adds further support to an interpretation "against mandatory bargaining").

CONCLUSION

For the reasons stated above and in the Brief for Appellant, the decisions below should be reversed.

Respectfully submitted,

RICHARD T. CONWAY
(Counsel of Record)
RALPH J. MOORE, JR.
D. EUGENIA LANGAN

SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

DAVID P. LEE
Vice Chairman and
General Counsel
NATIONAL RAILWAY
LABOR CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7200

Attorneys for the National Railway Labor Conference

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